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February 5, 2002

VIA HAND DELIVERY

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EX PARTE

FEB - 5 2002

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notification of Ex Parte Communication in ET Docket 98-206/RM-9147; RM-9245; Applications of Broadwave USA et al., PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide a fixed service in the d12.2-12.7 GHz Band; Requests of Broadwave USA et al. (DA 99-494), PDC Broadband Corporation (DA 00-1841), and Satellite Receivers, Ltd. (DA 00-2134) for Waiver of Part 101 Rules.

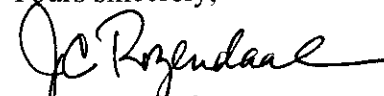
Dear Mr. Caton:

I write on behalf of Northpoint Technology, Ltd. to inform you that the attached letter was delivered to the following commission officials via e-mail yesterday:

Monica Shah Desai, Office of Commissioner Martin
Catherine Crutcher Bohigian, Office of Commissioner Martin
Peter Tenhula, Office of the Chairman
Bryan Tramont, Office of Commissioner Abernathy
Paul Margie, Office of Commissioner Copps

Eighteen copies of this letter are enclosed – two for inclusion in each of the above-referenced files. Please contact me if you have any questions.

Yours sincerely,



J.C. Rozendaal

Counsel for Northpoint Technology, Ltd.

attachment

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February 4, 2002

VIA HAND DELIVERY

EX PARTE

Ms. Monica Shah Desai
Office of Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notification of Ex Parte Communication in ET Docket 98-206; RM-9147; RM-9245; Applications of Broadwave USA et al., PDC Broadband Corporation, and Satellite Receivers, Ltd., to provide a fixed service in the 12.2-12.7 GHz Band; Requests of Broadwave USA et al. (DA 99-494), PDC Broadband Corporation (DA 00-1841), and Satellite Receivers, Ltd. (DA 00-2134) for Waiver of Part 101 Rules.

Dear Ms. Desai:

I write on behalf of Northpoint Technology, Ltd. and Broadwave USA, Inc. (collectively, "Northpoint"), in response to the January 28, 2002 ex parte letter addressed to you from Andy Wright of the SBCA.

The British author W. Somerset Maugham once wrote that "[h]ypocrisy is the most difficult and nerve-racking vice that any man can pursue; it needs an unceasing vigilance and a rare detachment of spirit. It cannot, like adultery or gluttony, be practised at spare moments; it is a whole-time job."¹ It is a job at which the SBCA excels. The SBCA criticizes Northpoint for asking the Commission to grant its long-pending license applications for 500 MHz without competitive bidding. Yet numerous SBCA members who filed applications at the same time as Northpoint are each due to receive approximately 3,000 MHz of spectrum without an auction *in these very proceedings*.

Satellite operators routinely receive thousands of MHz of spectrum without being subjected to competitive bidding. The satellite industry even lobbied Congress successfully to pass a prohibition on auctioning spectrum used for international satellite services in the ORBIT Act.² As recently as December 21, 2001, Boeing was granted a

¹ W. Somerset Maugham, *Cakes and Ale*, Ch. 1 (1930).

² Incidentally, Northpoint reads the ORBIT Act as prohibiting auctions of licenses for any use (including terrestrial use) of spectrum that is also used for international satellite services.

waiver for a non-conforming use of 1000 MHz of spectrum that is at issue in these proceedings, and the Commission did not even bother to call for competing applications before granting that satellite waiver application.³ And in its comments in these proceedings last year, EchoStar brazenly asked that at least half the spectrum Northpoint seeks to use should be set aside for the exclusive terrestrial use of DBS operators, and that DBS operators should not have to pay for the right to make terrestrial use of the remainder of the spectrum, either.⁴ Given this history, the SBCA's sudden conversion to the benefits of auctions for Northpoint (but never for its own members) should be recognized for the opportunistic, anticompetitive posturing that it is.

Northpoint has made the issuance of terrestrial licenses in the 12.2-12.7 GHz band possible by bringing its new technology to the Commission and proving the efficacy of that technology. Were it not for Northpoint, there would be no licenses to consider auctioning. By attempting to auction the fruits of Northpoint's ingenuity, the Commission would create a huge disincentive to future investments in developing new communications technologies. Why would anyone spend years at the Commission and millions of dollars just to get the opportunity to watch others try to outbid them for the right to implement their own ideas?

Ignoring these serious long-term consequences, the SBCA argues that an auction would be in the public interest because it could bring in as much as \$1 billion in revenues over 5 years. Let us leave aside, for now, the extremely low probability that an auction of dubious legality would raise anything like that much money. (According to the Commission's auctions Web site, total auction revenues for calendar 2001 were only \$44.5 million once the auctions associated with the NextWave fiasco are excluded.) There is a much more fundamental problem with the SBCA's argument: It invites the Commission to base its decision to auction licenses on a prohibited consideration. Section 309(j)(7)(A) of the Communications Act specifically commands that, in making a decision whether to assign spectrum to a use for which licenses will be issued via auction, "the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding." By urging the Commission to consider its own pecuniary interests in this way, the SBCA is emphasizing a factor that is not merely irrelevant but that, if considered, would render any resulting rules invalid. *See, e.g., Motor Vehicle Mfg'r's Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

Northpoint is eager for the chance to bring sorely needed fresh competition to the MVPD market, which has seen prices rise steadily in recent years despite the supposed competition between DBS and cable. Northpoint is prepared to commit to nationwide build-out within two years of licensing. If competition from Northpoint restrains DBS and cable's relentless price increases by just a few dollars per month, American

³ See Order and Authorization ¶ 18, *The Boeing Company Application for Blanket Authority to Operate Up to Eight Hundred Technically Identical Transmit and Receive Mobile Earth Stations Aboard Aircraft in the 14.0-14.5 GHz and 11.7-12.2 GHz Frequency Bands*, File No. SES-LIC-20001204-02300, DA 01-3008 (IB and OET rel. Dec. 21, 2001).

⁴ See Comments of EchoStar Satellite Corp. at vi-vii, ET Docket 98-206 et al. (FCC filed Mar. 12, 2001).

Ms. Monica Shah Desai
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consumers would save billions of dollars per year. The SBCA's chief goal in these proceedings is to thwart the emergence of Northpoint as a potent new competitor that could disrupt its cosy duopoly with the cable industry. Rather than delaying the onset of competition with an auction (and possibly crippling effective competition through piecemeal geographic licensing), the Commission should grant Northpoint's pending license and waiver applications so that consumers can begin to enjoy the long overdue benefits of competition in the MVPD market.

Thank you for your kind attention to this matter. Please contact me if you have any questions.

Yours sincerely,


J.C. Rozendaal

cc: Peter Tenhula, Office of the Chairman
Bryan Tramont, Office of Commissioner Abernathy
Paul Margie, Office of Commissioner Copps
Catherine Crutcher Bohigian, Office of Commissioner Martin

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CERTIFICATE OF SERVICE

I, Shonn Dyer, hereby certify that on this 5th day of February, 2002, copies of the foregoing were served by hand delivery* and/or first class United States mail, postage prepaid, on the following:

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